Middle East Tankers and Freighters v Owner of the Vessel and Other Interested Party in the Vessel of MV 'IRA'

HIGH COURT (JOHOR BAHRU) — ADMIRALTY IN REM NO 27-1-95
HAIDAR J
18 DECEMBER 1995

Civil Procedure *— Admiralty — Writ of summons — Application to strike out — Whether application to strike out can be entertained where unconditional appearance has been entered — Whether plaintiff has reasonable cause of action — Whether claim frivolous or vexatious — Rules of the High Court 1980 O 18 r 19*

Shipping and Navigation *— Action in rem — Claim for payment of bunker fuels supplied — Application to strike out writ — Whether defendant can apply to strike out writ having entered unconditional appearance — Whether plaintiff must prove a substantive claim before proceeding with action in rem — Whether plaintiff has reasonable cause of action against defendant for case to proceed to trial — Rules of the High Court 1980 O 18 r 19*

On 24 February 1995, the plaintiff filed an admiralty action in rem, pursuant to s 24(b) of the Courts of Judicature Act 1964 ('the Act'), against the defendant, Armonia Shipping and Finance Corporation ('Armonia'), the owner of the vessel MV 'IRA' ('the ship'), claiming US$82,859.06, being the cost of bunker fuels supplied to the ship allegedly at the request of the defendant in November 1994. The plaintiff claimed that it had entered into a contract with the defendant for the supply of bunker fuels to the ship, and the sum remain unpaid. The defendant denied having contracted with the plaintiff for the supply of bunker fuels. The defendant was the owner of the ship both in November 1994 and at the date of the issue of the writ. However, the charterer of the ship in November 1994 was Orion Maritime Ltd ('Orion'), but it was no longer the charterer at the time the writ was issued. On 13 March 1995, solicitors entered unconditional appearance for the defendant and filed a defence on 27 April 1995. On 3 August 1995, the defendant filed a summons-in-chambers under O 18 r 19 of the Rules of the High Court 1980 to strike out the plaintiff's writ and statement of claim. The defendant argued that the personal liability of Orion to the plaintiff was not sufficient to allow the issue of the writ in rem against the defendant, which could only be issued if the defendant, as owner, was personally liable to the plaintiff. Therefore, the basis of the defendant's application to strike out was that it was not personally liable to the plaintiff. In reply, the plaintiff contended that: (i) by entering unconditional appearance in the action, the defendant had waived all irregularity to the writ and was estopped from applying to strike out the action; and (ii) the plaintiff was entitled to have the issue of whether or not the defendant was personally liable decided at trial.

Held, dismissing the defendant's application to strike out:

(1) The rule in admiralty law is that, after unconditional appearance has been entered by the defendant, the issue as to whether or not the defendant is liable is a matter for trial. A defendant who objects to an irregularity in the writ of summons or the service of the writ or to jurisdiction must, if he wants to raise the ground, enter conditional appearance. As the defendant had entered unconditional appearance here, it could not raise its objections at this stage of the proceedings (see pp 116H, 117A–B; *The 'Avro Venture'* [1987] 1 MLJ 16; [1988] 1 MLJ 147 followed).

(2) There was no requirement that before the plaintiff could proceed in its claim in rem it must prove at the outset that it had a cause of action substantial in law. The plaintiff was entitled to bring its action and to have it tried and, whether or not its claim turned out to be a good one, it was entitled to assert its claim by proceeding in rem (see p 117G–I; *Scwarz & Co (Grain) Ltd v The 'St Elefterio' Owners* [1957] 1 Lloyd's Rep 283 and *Inter Maritime Shipping (Pte) Ltd v Owners of MV Wigwam* [1983] 1 MLJ 148 followed).

(3) On the evidence, it was clear that the plaintiff had a reasonable cause of action against the defendant, and its claim was neither frivolous nor vexatious. Even if the charterer, as alleged by the defendant, was responsible for the payment of the bunker fuels under the charterparty, it did not necessarily follow that as between the defendant and the bunker supplier, it was not liable. The question was whether those who dealt with the plaintiff had the authority of the owner, actual or apparent, to do so and whether the plaintiff intended to contract with the owner. It was clear here that there were issues of fact and law which could only be properly determined at trial with the benefit of viva voce and not affidavit evidence. The plaintiff's claim was not 'obviously unsustainable' (see pp 118H, 119C–E; *The 'Tanto Utama'* [1995] 1 SLR 767; *A-G of Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274 followed).

[Bahasa Malaysia summary

Pada 24 Februari 1995, plaintif memfailkan tindakan in rem admiralti, mengikut s 24(b) Akta Mahkamah Kehakiman 1964, terhadap defendan, Armonia Shipping and Finance Corporation ('Armonia'), pemunya kapal MV 'IRA' ('kapal itu'), menuntut US$82,859.06, iaitu kos minyak bunker yang dibekalkan kepada kapal itu kononnya di atas permohonan defendan pada bulan November 1994. Plaintif mendakwa telah berkontrak dengan defendan untuk pembekalan minyak bunker kepada kapal itu, dan jumlah itu tidak dibayar. Defendan menafikan telah berkontrak dengan plaintif untuk pembekalan minyak bunker itu. Defendan adalah pemunya kapal itu pada bulan November 1994 dan pada tarikh writ diisu. Walau

A bagaimanapun, pencarter kapal pada November 1994 adalah Orion Maritime Ltd ('Orion'), yang tidak lagi menjadi pencarter pada tarikh writ diisu. Pada 13 Mac 1995, peguam telah memasukkan kehadiran tidak bersyarat bagi pihak defendan dan memfailkan pembelaan pada 27 April 1995. Pada 3 Ogos 1995, defendan telah memfailkan saman dalam kamar di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk membatalkan writ plaintif dan pernyataan tuntutan. Defendan berhujah bahawa liabiliti sendiri Orion terhadap plaintif tidak mencukupi untuk membenarkan pengisuan writ in rem terhadap defendan, yang hanya boleh diisu jika defendan, sebagai pemunya, adalah bertanggungjawab sendiri terhadap plaintif. Oleh itu, asas permohonan defendan untuk pembatalan adalah ianya tidak bertanggungjawab secara sendiri kepada plaintif. Semasa menjawab, plaintif berhujah bahawa: (i) dengan memasukkan kehadiran tidak bersyarat terhadap tindakan itu, defendan telah menepikan segala luar aturan dalam writ itu dan diestop dari memohon untuk membatalkan tindakan itu; dan (ii) plaintif berhak untuk isu sama ada defendan bertanggungjawab sendiri atau tidak itu diputuskan di perbicaraan.

Diputuskan, menolak permohonan defendan untuk pembatalan:

(1) Rukun undang-undang admiralti adalah, selepas kemasukkan kehadiran tidak bersyarat oleh defendan, isu sama ada defendan bertanggungjawab atau tidak adalah persoalan untuk perbicaraan. Defendan yang membantah sesuatu luar aturan dalam writ saman atau penyampaian writ atau bidang kuasa mesti, jika dia mahu membangkitkan alasan itu, memasukkan kehadiran bersyarat. Oleh kerana defendan telah memasukkan kehadiran tidak bersyarat, ia tidak boleh membangkitkan bantahan pada peringkat ini dalam prosiding (lihat ms 116H, 117A–B; *The 'Avro Venture'* [1987] 1 MLJ 16; [1988] 1 MLJ 147 diikut).

(2) Tidak terdapat keperluan bahawa sebelum plaintif boleh meneruskan tuntutan in rem ia mesti membuktikan dari mula bahawa ia mempunyai kausa tindakan yang cukup mengikut undang-undang. Plaintif berhak membawa tindakan dan untuk ianya dibicarakan dan, sama ada tuntutan itu kesudahannya baik atau tidak, ia berhak untuk menegaskan tuntutannya melalui prosiding in rem (lihat ms 117G–I; *Scwarz & Co (Grain) Ltd v The 'St Elefterio' Owners* [1957] 1 Lloyd's Rep 283 dan *Inter Maritime Shipping (Pte) Ltd v Owners of MV Wigwam* [1983] 1 MLJ 148 diikut).

(3) Mengikut keterangan, ia adalah jelas bahawa plaintif mempunyai kausa tindakan yang munasabah terhadap defendan, dan tuntutannya bukanlah remeh dan menyusahkan. Walaupun pencarter, seperti yang dikatakan oleh defendan, yang bertanggungjawab untuk pembayaran minyak bunker di bawah carterparti, ia tidak semestinya bermakna bahawa di antara

defendan dan pembekal bunker itu, tiada tanggungjawab. Persoalan yang timbul adalah sama ada mereka yang berurus dengan plaintif mempunyai autoriti pemunya, yang sebenarnya atau zahir, untuk berbuat demikian dan sama ada plaintif berhasrat untuk berkontrak dengan pemunya. Ia adalah jelas di sini bahawa terdapat isu fakta dan undang-undang yang hanya boleh diputuskan dengan sempurna di perbicaraan dengan faedah pemeriksaan lisan dan bukan hanya dengan keterangan afidavit. Tuntutan plaintif bukanlah 'nyata sekali tidak boleh disokong' (lihat ms 118H, 119C–E; *The 'Tanto Utama'* [1995] 1 SLR 767; *A-G of Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274 diikut).]

Notes

For cases on writ of summons in admiralty, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 166–169.

For cases on action in rem in shipping and navigation, see 11 *Mallal's Digest* (4th Ed) paras 688–831; [1989] Mallal's Digest 1445; [1992] Mallal's Digest 1588–1594; [1993] Mallal's Digest 1235–1238; [1994] Mallal's Digest 2019–2032.

For cases on striking out pleadings and indorsements pursuant to the Rules of High Court 1980 O 18 r 19, see Malaysian Court Practice, High Court Practice [18.19.1]–[18.9.7].

Cases referred to

A-G of Duchy of Lancaster v London & North Western Railway Co [1892] 3 Ch 274

'Avro Venture', The [1987] 1 MLJ 16; [1988] 1 MLJ 147

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1993] 2 AMR 34:1969

'Gulf Venture', The [1985] 2 Lloyd's Rep 445

'Moschanthy', The [1971] Lloyd's Rep 37

Scwarz & Co (Grain) Ltd v 'St Elefterio' Owners, The [1957] 1 Lloyd's Rep 283

'Tanto Utama', The [1995] 1 SLR 767

'Tolla', The (1921) PD 22

Inter Maritime Shipping (Pte) Ltd v MV Wigwam, Owners of [1983] 1 MLJ 148

Legislation referred to

Courts of Judicature Act 1964 ss 23(b), 24(b)
Rules of the High Court 1980 O 18 r 19
Administration of Justice Act 1956 s 3(4) [UK]
Supreme Court Act 1981 ss 20(2)(m), 21(4) [UK]

S Selvaratnam (*Skrine & Co*) for the applicant.
Ral Sativale (*Sativale & Associates*) for the respondent.

Cur Adv Vult

Haidar J: Middle East Tankers and Freighters Sail (Offshore) ('the plaintiff') filed an admiralty action in rem against the owners of the vessel and other interested party in the vessel, MV 'IRA' registered at Monrovia, Liberia on 24 February 1995, as defendant, for US$82,859.06 being the cost of bunker fuels supplied to the ship MV 'IRA' at the request of the defendant in or about 23 November 1994, contracted interest at the rate of 1.5% per month and costs of the action pursuant to s 24(b) of the Courts of Judicature Act 1964 ('the Act').

At the same time, the plaintiff filed an ex parte summons in chambers with a certificate of urgency for a warrant of arrest to be issued against the ship MV 'IRA'. The application is supported by the affidavit of Raj Sativale Ramachandran, the solicitor having conduct of the matter on behalf of the plaintiff. As is usual, an undertaking was also filed in respect of any payments to the sheriff in respect of the arrest of MV 'IRA'. An order for the arrest of MV 'IRA' was issued by the court on 24 February 1995. MV 'IRA' was accordingly put under arrest when it berthed at the Pasir Gudang Port, Johor. It was subsequently released on a security provided by a third party.

It was the contention of the plaintiff that it had entered into a contract with the defendant for the supply of bunker fuels to MV 'IRA' ('RS-1'). The owner of MV 'IRA' at the time of the cause of action and the date of issue of the writ is Armonia Shipping and Finance Corporation ('Armonia'). This is not disputed. It was further contended by the plaintiff that through its agents, Frisol Bunkering BV of Netherlands ('Frisol'), delivered a total quantity of 644.952 metric tonnes of bunker fuels to MV 'IRA' at the Port of Emden on or about 26 November 1994 ('RS-2' and 'RS-3'). The plaintiff claimed to have invoiced the defendant the sum of US$82,859.06 for the bunker fuels sold and delivered and in spite of a final notice of demand and notice of institution of legal proceedings by the plaintiff dated 1 January 1995, the sum remained unpaid ('RS-4' and 'RS-5'). According to a check with the current entry from the Lloyd's Register of Ships 1993–1994, the owners of MV 'IRA' are described as Armonia Shipping and Finance Corporation ('RS-6').

On 13 March 1995, Messrs Skrine & Co entered an *unconditional appearance* for Armonia as the defendant (encl 13), and filed the defence on 27 April 1995 (encl 11) to the plaintiff's statement of claim dated 30 March 1995 (encl 10).

Subsequently, the defendant filed a summons-in-chambers dated 3 August 1995 (encl 15) under O 18 r 19 of the Rules of the High Court 1980 and its inherent jurisdiction to strike out the writ and the statement of claim (para (a)). In addition thereto, the defendant also prayed for the following:

(b) the guarantee dated 10 March 1995 given on behalf of the defendant to the plaintiff as security to the arrest of MV 'IRA' in respect of the

claim filed be cancelled and discharged and that it be returned to the defendant;

(c) damages suffered by the defendant for the wrongful arrest of MV 'IRA' be assessed by the Registrar;

(d) alternative to an order under striking out of the writ and the statement of claim, the plaintiff's action filed herein be stayed permanently;

(e) alternative to an order under (a) above, the guarantee dated 10 March 1995 granted on behalf of the defendant to the plaintiff as alternative security to the arrest of MV 'IRA' in respect of the claim filed by the plaintiff be reduced to a sum as is considered reasonable by this honourable court; and

(f) costs.

It is supported by the affidavit of K Ananthan, a partner of Messrs Skrine & Co and having conduct of this matter on behalf of the defendant (encl 12).

The plaintiff, through the affidavit of Subky Elias Hakim, the Chairman and General Manager of the plaintiff company (encl 14), opposed the application of the defendant. An affidavit-in-reply was filed by K Ananthan (encl 16). There are two further affidavits of Subky Amin Hakim (encls 17 and 26) and another affidavit of K Ananthan (encl 24) filed in respect of the application of the defendant.

At the hearing of encl 15, learned counsel for the defendant, S Selvaratnam, intimated that she would not be proceeding with the alternative prayer (d).

The following facts would seem to be not disputed.

The owner of MV 'IRA' both in November 1994 and February 1995 was Armonia. The charterer of MV 'IRA' in November 1994 was Orton Maritime Ltd ('Orion'). At the time the writ was issued, that is, February 1995, Orion was no longer the charterer of MV 'IRA'.

It was the contention of the defendant that an action in rem can only be properly issued out of this court if:

(i) the person liable to the plaintiff in an action in personam is the owner/charterer of the vessel at the time the cause of action arose, as in this case, about 23 or 24 November 1994; and

(ii) is also the owner or demise charterer of the vessel at the time the writ was issued, that is, 24 February 1995.

The defendant denied having contracted with the plaintiff for the supply of bunker fuels to its vessel MV 'IRA'. Though the defendant is the owner of MV 'IRA' but at the time of the issue of the writ Orion was no longer the charterer of MV 'IRA'. The plaintiff, according to the defendant's counsel, cannot bring an action against it by reason of the personal liability of Orion. It was contended that the liability of Orion to the plaintiff will not suffice to entitle the issue of the writ in rem. The writ in rem, it seems, can only be issued if the owner, Armonia, is liable in an action in personam to

A the plaintiff. It was, therefore, argued that a warrant of arrest of MV 'IRA' can only be issued properly if Armonia is liable in an action in personam to the plaintiff for a warrant can only be issued after and pursuant to the issue of the writ in rem. The basis of the defendant's (Armonia's) application is that Armonia is not liable in personam to the plaintiff. The defendant relied on the following documents:

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(a) the charterparty dated 6 May 1994 ('A-3' in encl 12);

(b) the off-line survey report dated 29 November 1994 ('A-4' in encl 12); and

(c) the final line statement ('A-4A' in encl 12).

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From the above exhibits, it would seem to show that the bunker fuels were the responsibility of Orion. The defendant went one step further to say that on the facts, the law of agency was not applicable in this action. A number of authorities was cited in support thereof.

Be that as it may, the plaintiff contended that it had no knowledge of D the charterparty between Armonia and Orion and one of the terms that Orion is to pay for the bunker fuels. It is not disputed that the plaintiff supplied the bunker fuels to MV 'IRA' through Frisol and accordingly paid Frisol for the supply of the bunker fuels to MV 'IRA' and the sum remained unpaid. The plaintiff said that the defendant as owner is liable E whereas the defendant contended that it was not liable and that Orion is responsible for the payment of the supply of the bunker fuels to MV 'IRA' even though the defendant is the owner.

It seems clear that in an O 18 application, the principles on which the court will exercise its discretion are well-established. The Supreme Court F in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 2 AMR 34:1969 at p 1975 stated:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindsey MR in *Hubbuck v Wilkinson* [1899] 1 QB 86 at p 91), G and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (*A-G of Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274 (CA)). It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 138, [1965] 2 All ER 871, H (CA)). The authorities further show that if there is a point of law which requires serious discussions an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in part materia with our O 33 r 2 RHC) (*Hubbuck v Wilkinson*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

I In order to invoke admiralty jurisdiction, the plaintiff will have to fulfil the requirements specified in s 21(4) of the UK Supreme Court Act of 1981 which is the law here by virtue of s 23(b) of the Act. Section 21(4) of the UK Supreme Court Act 1981 reads:

4 In the case of any such claim as is mentioned in s 20(2)(e)–(r), where: A

(a) the claim arises in connection with a ship; and

(b) the person who would be liable on the claim in an action in personam ('the relevant person') was, when the cause of action arises, the owner or charterer of, or in possession of or in control of, the ship, an action in rem may (whether or not the claim gives rise to maritime lien on the ship) be brought in the High Court against: B

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of the ship as respects all the shares in it or the charterer of it under a charter by demise, or

(ii) ...

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(1) The plaintiff's claim falls under s 20(2)(m), being goods or materials supplied, that is, bunker fuels.

(2) The claim arises in connection with the ship MV 'IRA' in which the plaintiff supplied bunker fuels to it.

(3) The person who would be liable in an action in personam ('the relevant person') was when the cause of action arose the owner or charterer of, or in possession or in control of the ship. The defendant would be liable to the plaintiff in an action in personam as the defendant was when the cause of action arose the owner of MV 'IRA' and is the beneficial owner of all the shares when this action was brought. D E

The defendant, it would seem, impliedly accepts (1) and (2) but denies (3). In other words, the defendant denies that it is the person who would be liable to the plaintiff.

It was the contention of the plaintiff that the issue of whether or not the defendant would be liable to the plaintiff on the claim is a matter that should properly go for trial and cannot be disposed of under O 18. F

The plaintiff relied on two grounds.

Ground (1)— Unconditional appearance by the defendant

The plaintiff contended that by entering unconditional appearance in the action, the defendant has waived all irregularity to the writ and is estopped from applying to strike out the plaintiff's suit. If the defendant desired to question (3) above, it should enter conditional appearance in the action and move this court to set aside the writ and the warrant of arrest. The rule in admiralty law is, it would seem, after unconditional appearance has been entered, the issue as to whether the defendant is or is not liable is a matter for trial. G H

Towards this end, the learned counsel for the plaintiff relied on the Singapore case of *The 'Avro Venture'* [1987] 1 MLJ 16. The facts are almost identical with the present suit. There the plaintiff arrested the ship 'Avro Venture' for a bunker claim. The defendants put up security for the plaintiffs' claim, had the ship released from arrest and entered unconditional appearance in the suit. Later, the defendants took out an application to I

A strike out the plaintiffs' suit and sought the cancellation of the security on the grounds that admiralty jurisdiction cannot be invoked against them. It was held that 'under the Rules of Court a defendant who objects to an irregularity in the writ of summons or the service of the writ or to jurisdiction must, if he wants to raise the ground, enter conditional appearance ... But, as they had *entered unconditional appearance*, they may not raise it now at this stage of the proceedings' (emphasis added). The Singapore Court of Appeal affirmed the judgment of the learned High Court judge (see [1988] 1 MLJ 147).

On this ground alone, the plaintiff should succeed to get the court to dismiss the defendant's application.

Ground (2) — Plaintiff is entitled to have the issue of whether the defendant is or is not the person who would be liable determined at the trial

In support thereof, learned counsel relied on the case of *Schwarz & Co (Grain) Ltd v The 'St Elefterio' Owners* [1957] 1 Lloyd's Rep 283. There the defendants, as in this action, applied to set aside the writ and warrant of arrest on the grounds that before the plaintiffs can proceed in rem, the plaintiffs must show that the owners of the ship proceeded against are persons who would be liable on the claim in an action in personam. Willmer J interpreting what is now s 21 of the Supreme Court Act 1981 (the successor to s 3(4) of the Administration of Justice Act 1956) rejected this argument in the following words at p 287 thereof:

> The words used, it will be observed, are 'person who would be liable, not the person who is liable', and it seems to me, bearing in mind the purpose of the Act, that the natural construction of those quite simple words is, 'the person who would be liable on the assumption that the action succeeds'. This action might or might not succeed if it were brought in personam: that would depend upon the view which the court ultimately took of the various contentions raised by Mr Roskill. But clearly, if the action did succeed, the person or persons who would be liable would be the owner or owners of the steamship St Elefterio. In such circumstances, in the absence of any suggestion that the action is frivolous and vexatious action, I am satisfied that the plaintiffs are entitled to bring it and have it tried, and that, whether or not their claim turns out to be a good one, they are entitled to assert that claim by proceeding in rem.

Nearer home, we have the Singapore case of *Inter Maritime Shipping (Pte) Ltd v Owners of MV Wigwam* [1983] 1 MLJ 148 where at p 150 Chua J said:

> ... that before a plaintiff can proceed in rem of a claim under s 3(1)(l) or (m) of the Act he need not prove at the outset that he has a cause of action substantial in law.

Quoting with approval the case of '*St Elefterio*', his Lordship went on to say:

> I am of the view that the plaintiffs are entitled to bring this action and to have it tried and that, whether or not their claim turns out to be a good one, they are entitled to assert their claim by proceeding in rem.

With respect, I entirely agree with such a view. A

I would next have to consider, as the defendant seemed to suggest, whether the plaintiff has a reasonable cause of action and its claim is neither vexatious nor frivolous.

The plaintiff contended that it supplied the bunker fuels on the credit of MV 'IRA' in which the defendant as owner would be liable to the B plaintiff. In support thereof, the plaintiff relied on the following evidence:

(a) proforma contract (see exh 'SH-1' at p 14 to encl 14) states bunkers will be supplied for the account of master and owner of MV 'IRA';

(b) confirmation/acceptance of contract by the plaintiff states the order is accepted on the basis that the master/owner is a buyer (see exh C 'SH-4' in encl 17);

(c) the master/chief engineer has made a written request to plaintiff's supplier for the supply of bunkers to MV 'IRA' (see exh 'SH-6' in encl 26);

(d) plaintiff's invoice No Evd/1292/94 for the bunkers supplied to MV D 'IRA' is addressed:

Master/Owner MV 'IRA' and Messrs Orion Maritime and/or Silver Line c/o Marine Oil Broking Ltd (see exh 'SH-1' at p 20 in encl 14); and

(e) the bunker receipts signed by the defendant's servant and employee E clearly show that the supply was on the credit of MV 'IRA' as follows:

> No disclaimer stamp of any type or form will be accepted on this bunkering certificate, nor, should any such stamp be applied, with alter, change, or waive sellers/suppliers lien against the vessel or waive vessel's ultimate F responsibility and liability for the debt incurred through this transaction. (See exh 'SH-1' at p 15 of encl 14.)

Further, in exh SH-1 at p 16 of encl 14, the following is clearly endorsed and it appears directly above the signature of the master/chief engineer (an employee of the defendant): G

> The above bunkers and samples received in good order and bought and sold on credit of the vessel for continuation of the voyage.

From the above evidence and the authorities, it would seem clear that the plaintiff has shown that it has a reasonable cause of action against the defendant and its claim is neither frivolous nor vexatious. It would be H different perhaps if in November 1994 and February 1995, the defendant was not the owner of MV 'IRA'.

The defendant alleged that it was unaware of some of the documents relied on by the plaintiff. Be that as it may, its main defence seemed to hinge on the fact that the supply of bunkers is for the account of its I charterer, Orion, and there is no contract between itself and the defendant. However, the plaintiff is not a party to the charterparty and therefore did not have any notice of the existence of the charterparty between the

A defendant and Orion and also its terms. Neither was the plaintiff advised that the bunker supply is for the sole account of Orion and not on the credit of MV 'IRA'.

In *The 'Tolla'* (1921) PD 22, it was held that the master had authority to pledge the owner's credit, and that even if the master had told the B plaintiff that his vessel was under time charter it would not affect the owner's liability in rem unless he also told the plaintiff that under the terms of the charterparty the expenses in respect of which the disbursements were made were payable by the charterer and not by the owners. Even if the charterer, as alleged by the defendant, is responsible for the payment of the bunkers under the charterparty, it does not necessarily follow that as C between itself and the bunker supplier, it is not liable. The question was whether those who dealt with the plaintiff had the authority of the owner, actual or apparent, to do so and whether the plaintiff intended to contract with the owner (see *The 'Tanto Utama'* [1995] 1 SLR 767).

From cl 67 of the charterparty (exh 'A13' in encl 12), the defendant's D charterer can bind the defendant in a contractual relationship with third parties (see exh 'A13' at p 21 of encl 12). In *The 'Gulf Venture'* [1984] 2 Lloyd's Rep 445 Shean J at p 448 said:

> It seems to me strongly arguable that shipowners are bound by the acts of their agents who acted through their sub-agents in asking plaintiffs to make E payments on their behalf. ... but the fact that the principal is not identified does not have the result that he is not liable to reimburse the shipping agent.

It seems clear to me that there are issues of facts and law which can only be properly determined at a full trial with the benefit of viva voce and not on affidavit evidence at this interlocutory stage.

F In the circumstances, it cannot be said that the claim of the plaintiff is on the face of it 'obviously unsustainable' (see *A-G of Duchy of Lancaster*).

In view of my finding in respect of prayer (a) of encl 15, there is no necessity for me to consider prayers (b) and (c) at the present stage.

In respect of the non-disclosure issue raised by learned counsel for G the defendant at the time the ex parte application for the arrest of MV 'IRA' by the plaintiff, the short answer is that it was never raised by the defendant in its application (encl 15) except subsequently by way of affidavit evidence (encl 24). Be that as it may, in my view, the plaintiff has sufficiently disclosed the documents that were available to them at the time of the ex parte application for the warrant of arrest of MV 'IRA'. I am H not persuaded to set aside the arrest and order the release of MV 'IRA' on this ground.

The defendant contended that the security provided by it through a third party for the release of MV 'IRA' is excessive and oppressive. It is not disputed that there was negotiation between the parties as to the amount I of security to be provided by the defendant. The guarantee dated 10 March 1995 is not a bank guarantee or a bail bond paid into court. It is simply a letter of undertaking given on behalf of the defendant by a third party. The sum of US$197,482.21 stated in the letter of undertaking was freely

negotiated between the parties' solicitors. There is no evidence shown by the defendant that the said figure was literally pushed down its throat but rather the plaintiff's original figure of US$207,432.21 was subsequently agreed to be reduced to US$197,482.21. It may be slightly on the high side but certainly it is not excessive and oppressive, having regard to the elements of interests and costs. In the result, I am of the opinion that the sum agreed for the security is reasonable. Therefore, I am not inclined to disturb it (see *The 'Moschanthy'* [1971] Lloyd's Rep 37).

In the circumstances, the application of the defendant is dismissed with costs.

Application dismissed.

Reported by AP Kinnear